

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Appellant,

v.

RICARDO MAYORAL,

Defendant and Appellant.

B287102

(Los Angeles County
Super. Ct. No. VA142833)

ORDER MODIFYING
OPINION

[CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed March 28, 2019 is modified as follows:

1. On page 9, the first sentence of the last paragraph, stating “The trial court sentenced Mayoral to 10 years in prison, reflecting six years for voluntary manslaughter and four years for the firearm enhancement, and awarded credits and imposed fines and fees.”, shall be replaced with “The trial court sentenced Mayoral to 10 years in prison: six years

for the voluntary manslaughter conviction, and four years under section 12022.5, subdivision (a), the firearm enhancement applicable to manslaughter. The trial court awarded credits and imposed fines and fees.”

2. On page 15 (continuing to page 16), the second full paragraph, beginning “As an initial matter . . .”, the third full paragraph, beginning “The minute order from the sentencing hearing . . .”, and footnote 5 shall be deleted in their entirety.
3. On page 16, the first sentence of the first full paragraph, stating “Having determined the applicable statutory section, we turn now to the merits of Mayoral’s appeal.”, shall be deleted.
4. On page 18, the third sentence of the Disposition, stating “Should the court choose not to strike the enhancement, the court is directed to correct the abstract of judgment and November 15, 2017 minute order to indicate a four-year enhancement under section 12022.5, subdivision (a), as opposed to 12022.53, subdivision (d), and to forward the corrected abstract of judgment to the Department of Corrections and Rehabilitation.”, shall be deleted.

This modification changes the judgment.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

JOHNSON, J.

BENDIX, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Appellant,

v.

RICARDO MAYORAL,

Defendant and Appellant.

B287102

(Los Angeles County
Super. Ct. No. VA142833)

APPEALS from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed and remanded with directions.

Jackie Lacey, District Attorney, Phyllis Asayama and John Harlan II, Deputy District Attorneys, for Plaintiff and Appellant.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters,

Assistant Attorney General, Zee Rodriguez and Noah P. Hill,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Ricardo Mayoral of second degree murder arising from the killing of Julio Cesar Padua, the boyfriend of Mayoral's sister, Dianne N. Padua had a history of physically abusing Dianne, including on the morning of the homicide. Later that afternoon, Padua arrived at the house Mayoral shared with family members, leading to a tense confrontation in which several witnesses testified Padua grabbed Dianne by the hair. Mayoral shot him in the head.

On Mayoral's motion, the trial court reduced the verdict to voluntary manslaughter based on heat of passion or imperfect defense of another. The People appeal from this ruling, arguing that the evidence was insufficient to support either theory. We hold there was sufficient evidence to support a finding that Mayoral killed Padua in a heat of passion, and do not reach the alternative theory of imperfect defense of another.

Mayoral also appeals, requesting that we remand to the trial court for resentencing in light of new law granting trial courts discretion to strike certain firearm enhancements. We agree that the case must be remanded for the trial court to exercise its discretion. We otherwise affirm the judgment.

FACTUAL BACKGROUND

1. Padua abuses Mayoral's sister

At the time of the homicide, Mayoral lived with his mother, Rosio N., and other family members, including his sister, Dianne, and uncle, Jonathan, who was close in age to Dianne and

Mayoral (all were in their twenties).¹ Their home was in territory claimed by the Florencia 13 gang. Dianne was in a relationship with Padua, a Florencia 13 gang member, with whom she had an 18-month-old daughter.

Padua had physically abused Dianne on multiple occasions. During one incident, taking place when Dianne was six months pregnant, Padua kicked her in the stomach, and Dianne kicked him in the genitals. The second incident took place when their daughter was two months old. Padua hit Dianne around the arms and face. A third incident took place a few months before the homicide; Dianne did not recall any details. During a fourth incident, at an unspecified time after their daughter had been born, Padua kicked Dianne's legs.

Dianne testified that she never told Mayoral directly about these incidents. However, she testified that she told her family at some point that Padua had been abusing her, and Mayoral conveyed that he did not think Dianne should stay with Padua or that Padua should live in the family home.

Mayoral testified that he knew about three incidents in which Padua abused Dianne.

2. The homicide

The day before the homicide, Padua and Dianne were together in a hotel room. Dianne picked up Padua's cell phone. Padua "went crazy" and pushed Dianne down on the bed, grabbing her neck and choking her. Dianne kicked him in the genitals and he released her.

¹ We were unable to locate Jonathan's last name in the record.

The day of the homicide, Dianne walked from the hotel towards her family's home, pushing her daughter in a stroller. Padua was riding on a bicycle. When they got close to the house, Padua hit Dianne on the cheek from behind. She tried to get away by walking towards her house. Padua caught up to her and began hitting her again. In the struggle, the stroller broke and the child got "caught in the tray of the stroller." Padua handed the child to Dianne and hit her again. Dianne screamed for her mother, and Padua left on his bicycle.

Mayoral was asleep at home. He woke up upon hearing his mother speaking with Dianne. Mayoral saw his sister's face was red and swollen. Dianne told him Padua had "fucked [her] up again." Mayoral told her she would have to accept that if she insisted on going back to him. Mayoral testified he was not upset at Padua for hitting his sister, but he was upset with Dianne for staying with Padua. Rosio similarly testified that Mayoral did not appear upset that Padua had hit Dianne, and Dianne could not recall any particular emotional reaction from him.

Mayoral went outside to smoke cigarettes with his mother's boyfriend. His uncle Jonathan joined them. Padua arrived on his bicycle. According to Mayoral, Padua screamed, "Well, come on. Let's do this, motherfucker. Let's do this." Jonathan yelled back and started walking towards Padua.

Dianne came out of the house and tried to stop Jonathan. When Jonathan kept moving towards Padua, Dianne asked Mayoral to go get Jonathan or Padua might hurt Jonathan.

Mayoral testified that he thought Padua might have a weapon, or that Padua's fellow gang members might be waiting nearby to ambush Jonathan, a tactic Mayoral knew of from

earlier gang attacks on Jonathan and another uncle. Mayoral went inside the house and retrieved a handgun he owned.

When Mayoral came back outside, Jonathan and Padua were yelling at each other, with Dianne and Rosio standing behind Jonathan. Dianne and Padua were also yelling at each other. Jonathan took out a baton. Mayoral testified that Padua did not retreat when he saw the baton but appeared angry and continued to yell at Jonathan.

Mayoral testified that at this point Jonathan and Dianne were on opposite sides of Padua. Jonathan was moving back and forth—Mayoral assumed he was doing so to make it difficult for Padua to hit him—and Padua would sometimes move towards Jonathan, sometimes towards Dianne. Padua then “grabbed [Dianne] by the hair or he [threw] his hand out to her” and Dianne was “bending over.” “Everyone” was “still yelling.”

Asked what was going through his mind at this point, Mayoral testified, “He was going to hit my sister” and “[s]he’s going to be badly beaten.” Asked if he believed Padua would “slap her on the face one time and leave her alone,” Mayoral said, “No. Obviously, he looks challenged by the baton and he looks like they’re playing a game of cat and mouse. It, actually, led me to believe that this time it was going to be even harder.”

Mayoral pulled out his gun and shot Padua in the back of the head, killing him. Mayoral testified that at the time he fired, Dianne was still bent over with Padua holding her.

Other witnesses’ testimony regarding the incident differed from Mayoral’s. Dianne and Rosio both testified that Padua grabbed Dianne by the hair, but that at the time of the shooting, Dianne had gotten away and was about 15 to 20 feet from Padua.

Bystander Enrique V. testified that Padua at first was moving towards Jonathan, Rosio, and Dianne, but at the time Mayoral shot him, Padua was backing away, with Dianne and Rosio standing behind Jonathan. Asked by the prosecution if he saw “either one of the females getting their hair pulled by the shooter,” Enrique said, “No,”² nor did he see either woman bending over. Enrique described Mayoral “panicking” after the shooting and “[p]acing around.”

Bystander Cynthia T. testified she saw a group of people “chas[ing]” Padua, with Padua “trying to run away from them.” At some point, most of the group walked away except for Jonathan, who raised a “bat” towards Padua. Cynthia heard a gunshot and Padua collapsed. None of the women was near Padua at the time he was shot, although one ran back to him after he collapsed.

3. Mayoral’s statements following the homicide

The jury heard a recorded police interview with Dianne in which she described talking to Mayoral sometime after the shooting. She said Mayoral had told her the reason he shot Padua was because Padua earlier that day had broken the stroller and endangered Dianne’s daughter. She also said Mayoral told her he was trying to scare Padua by shooting him in the arm or leg.

At trial, Mayoral denied knowing about the stroller incident or telling Dianne he shot Padua because of it.

² Presumably the prosecution intended to ask whether Enrique saw the victim, not “the shooter,” pull the hair of either woman. It is not clear from the record whether Enrique understood the prosecution to be asking about Padua or Mayoral.

The jury also heard a recorded police interview with Jessica M., whom Mayoral had been dating for six or seven weeks at the time of the shooting. Jessica said that Mayoral had called her and told her about the incident. Mayoral told her he saw one of his sisters getting beat up, so he went inside, got his gun, and shot Padua from a distance. Jessica said Mayoral shot Padua “because this is an ongoing thing” and he was “so fucking fed up. . . . He was agitated, frustrated, whatever.”

At trial, Mayoral denied telling Jessica he shot Padua because he was fed up; instead, he told her he shot Padua because Padua was about to hit Dianne.

4. Character testimony

Mayoral’s aunt and the owner of the company Mayoral worked for both testified that he was not a violent person, as did Rosio and Jessica. Rosio testified that Mayoral was not a gang member and that he worked hard to provide for the family.

PROCEDURE

An information charged Mayoral with one count of murder (Pen. Code,³ § 187, subd. (a)) with firearm enhancements (§ 12022.53, subds. (b)–(d)). The trial court instructed the jury on defense of another and voluntary manslaughter based on heat of passion or imperfect defense of another.

The jury convicted Mayoral of second degree murder and found the firearm enhancement allegations true.

Mayoral moved for a new trial or modification of the verdict under section 1181, subdivision (6). Mayoral argued the evidence “clearly established that [he] did not act from rational, calculated

³ All statutory citations are to the Penal Code.

judgment when he shot [Padua],” and requested the trial court reduce his conviction to voluntary manslaughter.⁴

The trial court announced a tentative ruling granting the motion. The trial court noted the following evidence: Dianne had told Mayoral and her family that Padua had abused her on numerous occasions. The day of the homicide Dianne told her family that Padua had abused her that morning, and Mayoral saw that her face was red. When Padua came over later, Dianne went to meet him and “there was more screaming and yelling going on.” Padua grabbed her by the hair and Dianne freed herself.

The trial court noted that Mayoral was not the initial aggressor, that Padua had abused Dianne the day of the homicide, and that Padua came to Dianne’s home and “issu[ed] threatening challenges to the defendant . . . and his family, further escalating the conduct.” Mayoral had “no history of violence.” “[H]e went in the house, came right out, takes the gun and shoots.”

The trial court noted that on a motion for a new trial, it sits as a “13th juror” and may order a new trial or reduction of the verdict if not “‘personally convinced beyond a reasonable doubt’ ” of the defendant’s guilt of the crime for which the jury convicted him. The trial court concluded, “I believe that the overall evidence is so powerful that the defendant acted in the heat of passion or under the mistaken and unreasonable belief in the defense of others that the court should reduce [the verdict] to a voluntary manslaughter.”

⁴ Mayoral’s additional grounds for his motion are not at issue in this appeal.

The trial court allowed the prosecution to file a brief responding to the tentative ruling. The prosecution argued that Mayoral never testified that he had acted out of irrational emotion, and there was no evidence that Dianne was in imminent danger when Mayoral shot Padua. Mayoral filed a reply, arguing that evidence of provocation need not come from the defendant himself, and other evidence supported modification of the verdict, including Padua's history of abusing Dianne, Padua's coming to Mayoral's house and "screaming threatening and challenging words," and the shooting taking place amidst a quarrel immediately following those "threats and challenges." Mayoral "played no part in instigating this quarrel." Further evidence that Mayoral acted from passion rather than reflection was the fact that the shooting took place in daylight in front of witnesses, Mayoral did not immediately flee but "paced back and forth in a state of panic," and the shooting was "far outside of [Mayoral's] ordinary character for non-violence."

After reviewing the additional briefing, the trial court granted Mayoral's motion, and adopted its earlier statements as well as "the statements made in [Mayoral's reply] in its entirety." The trial court reduced the verdict to voluntary manslaughter.

The trial court sentenced Mayoral to 10 years in prison, reflecting six years for voluntary manslaughter and four years for the firearm enhancement, and awarded credits and imposed fines and fees. We discuss sentencing in more detail in Part B of the Discussion section, *post*.

DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion In Reducing The Verdict To Voluntary Manslaughter

We begin with the People's appeal challenging the trial court's exercise of discretion to reduce Mayoral's verdict to voluntary manslaughter. We conclude the trial court did not abuse its discretion.

1. Standard of Review

Upon a defendant's motion, a trial court may grant a new trial "[w]hen the verdict or finding is contrary to law or evidence." (§ 1181, subd. (6).) However, "if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial." (*Ibid.*)

In determining whether a verdict is contrary to the evidence, the trial court "extends no evidentiary deference" to the jury's findings, and instead "independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.'" (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.) Thus, the trial court may "reweigh the evidence" and "resolv[e] conflicts in the evidence in a manner different from the jury's implicit findings." (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1307 (*Johnston*).)

"When it reweighs the evidence, the trial court exercises broad discretion," and we may reverse only if we conclude the trial court has abused that discretion. (*Johnston, supra*,

113 Cal.App.4th at p. 1307.) Thus, we “review[] the evidence in the light most favorable to the trial court’s ruling, drawing all factual inferences that favor the trial court’s decision. [Citations.] The trial court’s factual findings, express or implied, will be upheld if supported by any substantial evidence. [Citation.] The order will be reversed only if it can be said as a matter of law that there is no substantial evidence to support a judgment contrary to the verdict.” (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1252 (*Dickens*).) Our review is not limited to the evidence cited in the trial court’s order: “Because we are obligated to review the record independently to determine whether the ruling is supported by substantial evidence [citation], the [trial] court’s statement of its reasons, while perhaps helpful in focusing our review, is not dispositive.” (*Id.* at p. 1254.)

Although we review the trial court’s evidentiary conclusions for abuse of discretion, we review its rulings of law de novo. (*Johnston, supra*, 113 Cal.App.4th at p. 1307.)

2. The Trial Court’s Finding that Mayoral Killed Padua in the Heat of Passion is Supported by Substantial Evidence

“Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter. Heat of passion arises if, ‘at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.’” [Citation.] Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes

a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice.” (*People v. Beltran* (2013) 56 Cal.4th 935, 942, fn. omitted.)

Heat of passion “ ‘has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively,’ ” that is, “ ‘ “this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances.” ’ ” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

The People contend that the trial court’s finding that Mayoral acted in the heat of passion was based on evidence of Padua’s prior abuse of Dianne. The People concede that “a brother’s anger concerning ongoing domestic abuse of his sister by her boyfriend could very well give rise to extreme emotions and irrational behavior in a person of average disposition.” The People argue, however, that there was no evidence that Mayoral *subjectively* was provoked by the prior abuse or “that he was acting while in an altered state of mind.”

In support, the People cite Mayoral’s testimony that, when his sister told him about the abuse Padua had inflicted that morning, he was not upset, testimony echoed by that of Rosio and Dianne. The People also claim Mayoral’s testimony indicates “he was rationally processing his actions,” including considering the

potential danger from hidden gang members and his concern that Padua was going to beat his sister.

We disagree with the People's characterization of the trial court's ruling as focusing solely on Padua's past abuse of Dianne. Also significant was the evidence that, after abusing Dianne earlier that day, Padua approached Mayoral's house screaming challenging words, leading to an angry confrontation in which Padua seized Dianne by the hair. Mayoral testified that he feared Padua would harm his sister, so he drew his gun and fired. The trial court reasonably could infer that it was Padua's aggression towards Dianne at that moment, and Mayoral's fear and anger that he would harm her, that provoked Mayoral into rash action. While Padua's past abuse of Dianne might have informed Mayoral's perception of the threat Padua presented, it was the abuse occurring before Mayoral's eyes that was the immediate motivator.

The People suggest that, to the extent Mayoral was motivated by fear that Padua would strike his sister, that evidence would go towards a theory of imperfect defense of others, not heat of passion. The People contend that theory, under which Mayoral would have had to kill under the " 'actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury' " (*People v. Trujeque* (2015) 61 Cal.4th 227, 270), also fails for lack of evidence that Mayoral perceived an imminent threat.

Assuming for the sake of argument Mayoral did not believe his sister was in imminent danger of death or great bodily injury, nevertheless the trial court reasonably could conclude that Padua coming to Mayoral's house, screaming challenging words, then seizing Dianne's hair during the subsequent confrontation would

provoke rage and other strong emotions in Mayoral sufficient to cause him to act rashly and without deliberation. Even if Mayoral did not testify to such emotion, or offered testimony that contradicted this theory, a finder of fact is “entitled to disbelieve [a defendant’s] *reason* for shooting and to rely on the other evidence . . . to find that [the defendant] shot spontaneously and under the influence of extreme emotion.” (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1140; see also *People v. Barton* (1995) 12 Cal.4th 186, 202 (*Barton*) [jury could disregard defendant’s testimony that he fired his gun accidentally, and instead conclude he acted in the heat of passion or unreasonable belief he had to defend himself].)

The People argue that the trial court did not properly reweigh the evidence, as required under section 1181, subdivision (6), because it found that the evidence supported both heat of passion and imperfect defense of another. The People contend that these theories are “founded upon evidence that directly conflicts, requiring two opposing states of mind.” Under heat of passion, the People argue, the evidence must show a lack of reflection, whereas under imperfect defense of another, Mayoral had to rationally, albeit unreasonably, conclude his sister was in danger and he needed to act to protect her.

Our Supreme Court has indicated that the theories of heat of passion and imperfect defense of another are not inconsistent, and that extreme emotion can also cause an unreasonable belief of imminent peril. (See *Barton, supra*, 12 Cal.4th at p. 202 [jury could conclude that defendant’s judgment was “clouded by his anger,” causing him to “unreasonably believe[] that [the victim] was armed and trying to attack him”].) Regardless, we are not bound by the trial court’s stated conclusions and must

uphold the judgment if substantial evidence supports the ruling under any theory. (*Dickens, supra*, 130 Cal.App.4th at pp. 1252, 1254.) Because we conclude substantial evidence supports the trial court's finding that Mayoral acted in the heat of passion, we hold that the trial court did not abuse its discretion in reducing the verdict to voluntary manslaughter. We do not address whether substantial evidence supports the alternative theory of imperfect defense of another.

B. Remand For Resentencing Under Senate Bill No. 620 Is Warranted

We now address Mayoral's appeal. Mayoral requests that we remand to the trial court for resentencing in light of recent law granting trial courts discretion to strike certain firearm enhancements.

As an initial matter, we must determine under what statute the trial court imposed the four-year enhancement.

The minute order from the sentencing hearing and the abstract of judgment indicate that the trial court imposed the enhancement under section 12022.53, subdivision (d), the enhancement alleged in the information. That statutory provision, however, applies to murder (among other enumerated felonies), not manslaughter, and imposes an enhancement of 25 years to life. (§ 12022.53, subds. (a), (d).) As the parties acknowledge in their appellate briefing, it appears the trial court, having reduced the verdict to voluntary manslaughter, instead applied the four-year firearm enhancement under section 12022.5, subdivision (a).⁵ We agree, and thus direct the trial

⁵ The parties do not contest the trial court's authority to do so, and we therefore do not address the issue further.

court to correct the minute order and the abstract of judgment as indicated in the Disposition, *post*.

Having determined the applicable statutory section, we turn now to the merits of Mayoral's appeal. At the time the trial court sentenced Mayoral in November 2017, it had no discretion to strike the enhancement under section 12022.5. (See § 12022.5, former subd. (c).) Effective January 1, 2018, however, Senate Bill No. 620 (Stats. 2017, ch. 682) amended section 12022.5, subdivision (c) to grant trial courts discretion to "strike or dismiss" the enhancement "in the interest of justice." Courts have held, as the People concede, that the amendment applies retroactively to judgments like Mayoral's that are not yet final. (See, e.g., *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080.)

Mayoral argues that the cause should be remanded so the trial court may exercise its new discretion to strike the enhancement. " '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, alterations in original.) "[A] remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*Ibid.*)

Here, the trial court and the parties expressly discussed the future application of Senate Bill No. 620, with defense counsel noting that "[a]s of January 1st the court will have discretion to strike the gun allegation." The trial court then pronounced

sentence: “In this matter, the court selects the midterm of 6 years, and the midterm on the gun allegation for 4 years, for a total term of 10 years. [¶] The court is making this determination based on the present state of the law. If the law changes, the court reserves the right under new circumstances to resentence. [¶] The court’s idea is that this young man did kill a human being, there’s no doubt about that. And the court looks at the totality of the circumstances and believes that 10 years is an appropriate sentence. Ten to 11.”

The trial court then referred to the pending change in the law: “It would be my inclination if this new law is retroactive—well, I can actually leave the sentence where it is. It’s discretionary. [¶] So that’s the court’s ruling.”

The trial court’s statements at sentencing do not clearly indicate that it would decline to exercise its discretion to strike the enhancement under the new law. Significantly, the trial court expressly stated that its sentence was “based on the present state of the law,” and that it “reserve[d] the right under new circumstances to resentence.” Although, as the People point out, the trial court stated that its “inclination” under the new law would be to “leave the sentence where it is,” it did not indicate definitively what its ruling under the new law would be.

The People note that even before the enactment of Senate Bill No. 620, the trial court had the option to impose the low term of three years for the firearm enhancement under section 12022.5, subdivision (a). The People argue that because the trial court declined to impose the low term, “there is no logical possibility the court would have chosen instead to impose *zero* years . . . if that option had been available at the time of sentencing.” The People’s argument is in tension, however, with

the trial court's express reservation of its right to resentence "under new circumstances." At the very least, the trial court's position was ambiguous, and thus not a clear indication that remand would be futile.

DISPOSITION

Upon remand, the trial court shall determine whether to strike the firearm enhancement under section 12022.5. If the court strikes the enhancement, the court shall reduce the sentence accordingly, amend the abstract of judgment and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. Should the court choose not to strike the enhancement, the court is directed to correct the abstract of judgment and November 15, 2017 minute order to indicate a four-year enhancement under section 12022.5, subdivision (a), as opposed to 12022.53, subdivision (d), and to forward the corrected abstract of judgment to the Department of Corrections and Rehabilitation. The judgment in all other respects is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.